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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 543

NICHOLAS DEB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA; MACON L. WEAVER, AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ALABAMA, APPELLANTS

v.

OLLIE MCCLUNG, SR., AND OLLIE MCCLUNG, JR.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (R. 34) is not yet reported.

JURISDICTION

The order of the district court was entered on September 17, 1964 and a notice of appeal filed on the same date.[1] The jurisdictional statement was filed on

[1] A stay of the order was denied by the district court on September 18, 1964, but granted by order of Mr. Justice Black, dated September 23, 1964.

September 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the complaint should be dismissed for want of equity jurisdiction.

2. Whether Title II of the Civil Rights Act of 1964 is constitutional insofar as it prohibits racial discrimination by a restaurant "if * * * a substantial portion of the food which it serves * * * has moved in commerce."

STATUTES INVOLVED

The relevant statutory provisions are printed in Appendix A to the government's brief in the companion *Heart of Atlanta* case, No. 515.

STATEMENT

On July 2, 1964, the President of the United States signed into law the Civil Rights Act of 1964. On July 3, 1964, certain unnamed and otherwise unidentified Negroes allegedly entered "Ollie's Barbecue", operated by appellees in Birmingham, Alabama. They requested, but were refused, service at the meal counter; instead, they were offered "take-out" service at the "colored take-out" end of the counter (R. 87–88). Although the federal government had had no communication with appellees concerning compliance with the Civil Rights Act of 1964, appellees, on July 31, 1964, filed a complaint in the United States District Court for the Northern District of Alabama to prohibit appellants from enforcing or attempting to enforce the Act against them.

The complaint contains the following allegations: Appellees' restaurant serves approximately 500,000 meals annually and has gross sales of $350,000 (R. 2). The establishment serves food and non-alcoholic beverages, but specializes in barbecued meats and pies which account for 90% of the business (R. 2). There is parking space on the premises for about 90 automobiles and the seating capacity of the restaurant is about 200 persons. Appellees have 36 employees, 26 Negro and 10 white (R. 2).

"Ollie's Barbecue" is located in a part of Birmingham "largely occupied by Negro residences, and by industrial concerns employing a large number of Negro employees" (R. 4). There is a truck route one block away; the nearest "Federal or Interstate" highway is 11 blocks away; the railroad station 17 blocks; the bus station 20 blocks; and the airport more than five miles (R. 2).

Appellees "do no advertising and make no effort to attract transient customers" (R. 2). The restaurant "derives no trade" from the truck route and, to their knowledge, appellees serve no interstate travelers (R. 2). Negroes have never been served food or beverages for consumption on the premises but have been served for many years on a "take-out" basis (R. 3, 4). If Negroes were allowed service for consumption on the premises, they would occupy appellees' restaurant in large numbers, to the exclusion of appellees' regular customers (R. 5). Appellees' business and property would thereby suffer great injury (R. 5).

The restaurant is described by appellees as "essentially local in character," purchasing all of its food "within the State of Alabama" (R. 2, 5). Although "some of the food served" by appellees "probably originates in some form outside the State of Alabama", the operation of the restaurant, it was averred, "in no way affects interstate commerce" (R. 6).[2]

The complaint further averred that the Civil Rights Act of 1964 exceeds the power granted to Congress under the commerce clause; that enforcement of the Act would deprive them of property without due process of law; that to require appellees to serve persons they had not chosen to serve would constitute "involuntary servitude;" and that "any effort to enforce said Act against these [appellees] would be invalid, in contravention of natural law and in violation of the Tenth Amendment of said Constitution" (R. 6–7).

Appellees state additionally that the Attorney General and his subordinates are enforcing the Act against others in reliance upon the provision "that a restaurant's operations 'affect commerce' if a substantial portion of the food which it serves has merely moved in commerce" (R. 5). They assert that "[t]here is a real and genuine threat" that appellants will seek to apply it to them and that they have "no adequate remedy in law" (R. 7).

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[2] After appellants had moved to dismiss on the ground, *inter alia*, that there was no case or controversy, appellees produced testimony and affidavits indicating that the meat products which they purchased for use originate outside the State of Alabama, thus bringing themselves within the language of section 201(c)(2) of the Act.

On August 4, 1964, a three-judge court was designated. On the following day, a hearing was scheduled for September 1, 1964 on appellees' prayer for a temporary injunction (R. 11, 12). On August 19, 1964, appellants filed a motion to dismiss, asserting that the court lacked equitable jurisdiction because appellees had an adequate remedy of law by way of a defense to a proceeding under Title II of the Civil Rights Act of 1964 (R. 16–17).

On August 21, 1964, appellees filed an amendment to their complaint, striking references to JOHN DOE AND RUTH ROE, unidentified private defendants. The amendment added the claim that the Civil Rights Act of 1964 violated appellees' rights under the First Amendment (R. 18–19).

On September 1, 1964, a hearing was held on the appellants' motion to dismiss and on appellees' prayer for a preliminary injunction. The only witnesses were the appellees. Their testimony largely repeats the allegations of their complaint. However, in testifying that the nearest interstate highway was 11 blocks from his restaurant, Ollie McClung, Sr., acknowledged that there was a State highway which passed directly by his restaurant and intersected the interstate highway (R. 71). He also stated that he had declined service to Negroes because of their race (R. 77); that most of the restaurants in Birmingham had served Negroes since the Civil Rights Bill was signed on July 2, 1964; that one of them had lost 25 percent of its business; and that he had not heard from any representative of the federal government concerning compliance with the Civil Rights Act

(R. 78, 86). Ollie McClung, Jr., testified that on July 3, 1964, a group of Negroes requested counter service at the restaurant and were refused because "it wasn't our policy to serve them there and they got up and left" (R. 88). An affidavit was introduced to the effect that all of the meat sold to appellees by their principal supplier, valued at $69,683 for the past twelve months and constituting 46 percent of all its purchases, was procured from facilities located outside the State of Alabama (R. 31–32).

On September 17, 1964, the three-judge court ruled that Title II of the Act is unconstitutional as applied to appellees and enjoined appellants from enforcing it against them pending further order of the court. The court found that a substantial portion of the food served by appellees had moved in commerce and that they were therefore within the terms of the statute. It stated that since Title II imposed a mandatory duty of service upon appellees and since the Attorney General was engaged in enforcing it according to its terms, the prospect of its application to appellees was "reasonably imminent." Turning to the question whether the Act was a proper exercise of the commerce power, the court reasoned that the out-of-State supplies handled by appellees had come to rest before they were sold by the restaurant and that there was no basis for concluding that there was any "demonstrable causal connection" between the activities of the restaurant and interstate commerce.[3] In

[3] The court had previously ruled that the legislative powers conferred by the Fourteenth Amendment was not in point since there was no showing that the State of Alabama was in-

these circumstances, the court stated, application of the Act to appellees would violate the Fifth Amendment.

SUMMARY OF ARGUMENT

I

The complaint should be dismissed for want of equity jurisdiction. Title II of the Civil Rights Act of 1964 provides for enforcement only by a civil action for an injunction, at which point all factual and legal defenses can be raised. The Act authorizes no criminal prosecution and provides for no civil penalties. There is no provision for the award of damages to any person. In this case there has been no threat to seek an injunction against appellees; before they filed suit the Department of Justice did not even know of their existence. Appellees claim that they would be injured by compliance but they deny any intent to comply and they neither alleged nor proved that the Act operated *ex proprio vigore* to discourage patronage and thus injure their business. In short, this is a suit seeking to enjoin a possible suit for an injunction not even threatened.

There is no precedent for adjudicating constitutional issues in such an action. Even where the statute provides criminal penalties, the imminence of prosecution "is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordi-

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volved in appellees' decision not to serve Negroes. The Birmingham restaurant segregation ordinance involved in *Gober* v. *City of Birmingham*, 373 U.S. 374, was repealed on July 26, 1963 (Ordinance No. 63–15).

hance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction." *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163.

There are three reasons for that rule, which apply with still greater force where there is no shadow of present injury and the statute provides no penalties. *First*, the judicial branch will not adjudicate questions of constitutionality in the absence of a clear need. *Second*, permitting such suits would interfere with the normal processes of law enforcement by compelling the Department of Justice to expend its substance in defending unnecessary cases instead of applying its resources in the manner best calculated to promote the public interest. *Third*, a rule allowing suits to enjoin enforcement of the Civil Rights Act could not be confined to that statute alone but would extend at least to all other regulatory laws, State and federal, when challenged on constitutional grounds. The potentiality for damaging interference with the normal administration of government is obvious.

II

Section 201 of the Civil Rights Act of 1964, both in general and as applied to appellees' restaurant, is a valid exercise of the constitutional power to regulate interstate commerce.

The power to regulate interstate commerce extends to local activities which are not part of the stream of commerce but whose regulation is appropriate to foster and promote commerce, or to protect it from

burdens or obstructions. This principle is established by a wealth of decisions in this Court extending back to *Gibbons* v. *Ogden*, 9 Wheat. 1. Both this Court and inferior courts have repeatedly applied the principle to federal regulation of the activities of retail establishments, including restaurants, where those activities would burden or obstruct interstate commerce. The critical inquiry in the present case, therefore, is whether racial discrimination in a local restaurant, as a matter of fact, burdens or obstructs the movement of goods in interstate commerce.

That practical inquiry is primarily for Congress, and its action is binding unless it appears to have no reasonable relation to the authorized end. Here, the evidence before Congress gave it ample ground for concluding that racial discrimination in places of public accommodation that receive goods from out-of-State sources, including restaurants, is a prolific source of disputes and demonstrations sharply curtailing their business activities and reducing their purchases of out-of-State goods. In addition, the practice of racial discrimination in places of public accommodation was shown drastically to curtail the retail market and thus to restrict the demand for out-of-State goods.

It is irrelevant that the volume of goods purchased by appellees' restaurant, viewed in isolation, has scant effect upon the total volume of goods moving in interstate commerce. Congress was entitled to take into account the fact that each individual situation was representative of many others throughout the

country, the total incidence of which would be far-reaching in its impact upon commerce. It was also entitled to judge the importance of the commercial relationship between racial discrimination in restaurants and the interstate flow of goods in the light of the evidence that the discrimination and resulting threat of disturbances at any one establishment are part of a complex and interrelated national problem.

The absence of an explicit recital that Congress found that racial discrimination in places of public accommodation burdens interstate commerce does not warrant the conclusion, drawn in the opinion below, "that Congress has sought to put an end to racial discrimination in all restaurants wherever situated regardless of whether there is any demonstrable causal connection between the activity of the particular restaurant * * * and interstate commerce" (R. 48). Except where it was dealing with discrimination supported by State action in violation of the Fourteenth Amendment, Congress prohibited discrimination only in those establishments which have a close and intimate tie to interstate commerce—in the case of restaurants, through serving food which comes from out of State (Section 201(d)). We think this amounts to a declared finding that in such establishments racial discrimination burdens and obstructs interstate commerce. But even if that affirmative inference is unwarranted, the reasoning below has a fatal gap. Those challenging the constitutionality of an Act of Congress must show "that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress" (*United States* v.

Butler, 297 U.S. 1, 67). Formal findings may aid the Court to understand the predicate of particular legislation but "[e]ven in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators" (*United States* v. *Carolene Products Co.*, 304 U.S. 144, 152). Appellees have not only failed to make such a showing but the factual support for the legislation affirmatively appears.

Nor is Title II invalidated by the absence of provision for an administrative or judicial finding whether discrimination in an individual restaurant affects interstate commerce. *United States* v. *Darby*, 312 U.S. 100, 120–121; *Labor Board* v. *Reliance Fuel Co.*, 371 U.S. 224.[1]

ARGUMENT

In the court below the government urged (1) that the bill should be dismissed for want of jurisdiction upon several grounds, among others because equity would not enjoin the enforcement of a statute where there was no threat to apply it to the plaintiff and no danger of injury; and (2) that if the district court

[1] The arguments presented by appellees under the First, Fifth, Ninth, Tenth and Thirteenth Amendments are answered, so far as appears necessary, in our brief in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, this Term.

reached the merits, Title II of the Civil Rights Act of 1964 should be held constitutional.

From the standpoint of the immediate administration of the Civil Rights Act we would welcome a decision upon the constitutionality of Title II as applied to establishments like appellees' restaurant. The decision below, however, sustaining the power of a district court to render an opinion upon the constitutionality of a federal statute upon the bare request of any person who alleges that he is subject to the Act, without any showing of irreparable injury, threatens such serious interference with the normal operations of the government as to require us to insist upon the jurisdictional objection in addition to arguing the merits.

I

THE COMPLAINT SHOULD BE DISMISSED FOR WANT OF EQUITY JURISDICTION

In the present case plaintiffs sued only to enjoin a possible future suit for an injunction. Prior to the filing of suit neither the Attorney General nor the Department of Justice even knew of the plaintiffs' existence, much less any of the facts bearing upon the coverage of their restaurant under Section 201(c)(2) and their compliance with Section 201 (a). The only possible sanction that anyone can invoke against them is a civil action to compel future compliance.

We know of no precedent for such a superfluous action. Plaintiffs cannot be harmed by waiting to assert their contentions as defenses if and when the Attorney General (or a private party) seeks to enforce

the statute. Present relief is not only quite unnecessary, therefore, to protect their interests; it is also affirmatively harmful to the recognized and significant public interest in avoiding premature decision of constitutional questions and in allowing authorized officials to exercise an informed discretion in administering regulatory legislation.

A. The Civil Rights Act of 1964 was carefully drawn so as to ensure that no proprietor of a "place of public accommodation" would be subjected to any sanction or liability until after the applicability of Title II to his business had been determined in a district court proceeding for an injunction with full opportunity for appellate review. Title II provides only for enforcement by a civil action for an injunction. There are no criminal or civil penalties. There is no provision for the award of damages. Section 207(b) provides explicitly that "[t]he remedies provided in the title shall be the exclusive means of enforcing the rights based on this title * * *." Appellees can incur no legal sanctions until (1) their rights and duties under the Constitution and statute have been determined in the federal courts and (2) they have been ordered to comply with the statute. They are not even subjected to the familiar choice of obeying the statute or incurring the risk of prosecution.

There neither is nor could be a showing that the mere existence of the statute and the general intention of the Attorney General to enforce it subjects ap-

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It is possible that if outsiders conspire to prevent a restaurant from complying with Section 201, they can be prosecuted under 18 U.S.C. 241.

pellees to a threat of irreparable injury. Appellees contend that the statute is void because it is unconstitutional and allege that their business and property would suffer *if* they complied with the statute (Complaint, par. 7); but they are not currently complying, do not intend to comply, and incur no risk of any sanctions for failure to comply until after their rights and duties have been determined in judicial proceedings. There is also an allegation that "[e]nforcement or attempts to enforce said Act against plaintiffs by either defendants or by other so-called 'aggrieved' persons would subject plaintiffs to the burdens, inconvenience and expense of litigation and the aggravation of such burdens and expenses occasioned by a potential multiplicity of suits" (Complaint, par. 8). This allegation will not survive analysis. An enforcement suit by the Attorney General, if one were brought, could subject appellees to no greater trouble or expense than their own suit against the Attorney General; indeed, from appellees' standpoint, the former expense was contingent at worst whereas by prosecution of this action they insisted upon incurring those costs. And an injunction issued against the Attorney General would not bar suits by aggrieved persons. The grounds of the decision might discourage future litigation, but no more so than would the grounds of decision in the first suit for an injunction brought against appellees under the statute. The likelihood or unlikelihood of a multiplicity of suits is identical in both circumstances. Nor is the possibility that an unknown person, at some unknown future time, may file some

unidentified suit, based perhaps upon new conditions, a sufficient ground for equitable relief.

In sum, appellees have failed to show irreparable injury or other grounds for an injunction, because they have an entirely adequate remedy in the defense of any action for an injunction that the Attorney General may bring against them. The complaint is no more than a request for an immediate advisory opinion upon the constitutionality of Title II of the Civil Rights Act, having no foundation other than the possibility that the Attorney General may, at some future date, seek an injunction requiring appellees prospectively to comply with the Act. Whether that be enough for a "case or controversy" may be open to argument, but it is plainly insufficient to support equity jurisdiction in a suit intended to determine the constitutionality of a federal statute.

B. In a case where a party seeks to enjoin enforcement of a law on constitutional grounds, the courts are insistent not only that his claim be concrete and ripe, but that he be able to show the threat of immediate, irreparable injury which makes it necessary for equity to intervene without delay. Speaking of a suit to enjoin a State regulatory law imposing criminal sanctions, Chief Justice Hughes stated in *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95:

> The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 500. See, also, *In re Sawyer*, 124 U.S. 200, 209–211; *Davis & Farnum Manufacturing Co.* v. *Los*

> *Angeles*, 189 U.S. 207, 217. To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. See *Terrace* v. *Thompson*, 263 U.S. 197, 214; *Packard* v. *Banton*, 264 U.S. 140, 143; *Tyson* v. *Banton*, 273 U.S. 418, 428; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 452; *Ex parte Young*, 209 U.S. 123, 161–162. We have said that it must appear that "the danger of irreparable loss is both great and immediate"; otherwise, the accused should first set up his defense in the state court, even though the validity of a statute is challenged. * * *

The point was restated by Chief Justice Stone in *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163–164:

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction.

Similarly, the courts have repeatedly refused to enjoin federal officials from proceeding against violations of federal statutes. *E.g.*, *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435 (C.A. 5); *Ryan* v. *Amazon Petroleum Corp.*, 71 F. 2d 1, 6 (C.A. 5); *Richmond Hosiery Mills* v. *Camp*, 74 F. 2d 200 (C.A.

5); *Sparks* v. *Mellwood Dairy*, 74 F. 2d 695 (C.A. 6); *Board of Trade of Kansas City* v. *Milligan*, 90 F. 2d 855 (C.A. 8). The mere fact that the government's law enforcement officers stand ready to perform their enforcement duties under the Act "falls far short of such a threat as would warrant the intervention of equity." *Watson* v. *Buck*, 313 U.S. 387, 400; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 88. See, also, *Lion Manufacturing Corporation* v. *Kennedy*, 330 F. 2d 833 (C.A. D.C.).

These are some cases which indicate a softening of the requirement that the danger of irreparable loss be both "great and immediate." *E.g.*, *Browder* v. *Gayle*, 142 F. Supp. 707, affirmed, 352 U.S. 902, and *Crown Kosher Supermarket* v. *Gallagher*, 176 F. Supp. 466, reversed on other grounds, 366 U.S. 617. Possibly *Wickard* v. *Filburn*, 317 U.S. 111, was such a case, although the point is not discussed in the opinion. We know of no decision, however, remotely suggesting that the bare allegation that one is covered by an allegedly unconstitutional statute providing no penalties and creating no sanctions save a possible action for prospective relief is sufficient to obtain an injunction against the normal processes of law enforcement. To such a case as this, therefore, the three considerations opposed to anticipatory intervention by equity with the processes of law enforcement through criminal prosecution apply with still greater force.

First, the judicial branch will not adjudicate questions of constitutionality in the absence of necessity.

"It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." 1 Cooley, *Constitutional Limitations* (8th ed.), p. 332, quoted by Mr. Justice Brandeis concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341, 345. The principle is exemplified by familiar precepts: the Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding;[6] or when the case may be decided upon another ground;[7] or when the action is brought by one who fails to show that he has been injured by the operation of the statute.[8] The basic policy is also implemented by the rule barring injunction against the enforcement of a statute by public officials where the complainant, without risk of irreparable injury, could wait and raise his constitutional defense in any action brought against him.

Second, the rule is necessary to prevent interference with the normal processes of law enforcement. If the possibility that appellees might be sued by the Attorney General to compel them to comply with the statute at some indeterminate future date were

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[6] *E.g.*, *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345.

[7] *E.g.*, *Siler* v. *Louisville and Nashville R. Co.*, 213 U.S. 175, 191; *Berea College* v. *Kentucky*, 211 U.S. 45, 53.

[8] *E.g.*, *Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405; *Hendrick* v. *Maryland*, 235 U.S. 610, 621.

sufficient predicate for them to bring action against the Attorney General, any proprietor of any place of public accommodation in the United States, who is potentially subject to the Civil Rights Act of 1964, could seek an advisory determination as to whether the statute could be constitutionally applied to him. The resources of the government are not unlimited. It is essential that the time and funds available for enforcement be allocated in a manner that will best promote the public interest. The necessity of defending every case in which one potentially subject to the statute desires an advisory opinion upon its constitutionality would interfere significantly with the normal processes of law enforcement.

The facts in the present case are particularly striking. There were, in 1958 (the last year for which published Census figures are available),[9] over 115,000 restaurants, lunch counters, and gasoline stations in 16 Southern or border States[10] which, if they meet the statutory test of "affecting commerce," as most will, are places of public accommodation under Section 201(b)(2) of the 1964 Act. There are, in addition, about 20,000 hotels and motels in these States which fall under Section 201(b)(1), and another 6,000 motion picture theaters which fall under Section 201(b)(3). The Civil Rights Division of the

[9] The 1958 Census of Business, compiled by the U.S. Bureau of the Census. A similar study was made during 1963, but it has not yet been published.

[10] Texas, Louisiana, Oklahoma, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, Florida, Georgia, South Carolina, North Carolina, Virginia, West Virginia, Maryland, Delaware.

Department of Justice has 55 lawyers to handle litigation under Title II, as well as all the other titles of the 1964 Act, the 1960 Act,[11] the 1957 Act,[12] and the early federal civil rights statutes.[13] It is hardly necessary to point out the import of these facts. The Department of Justice can only perform its functions under these statutes if it is free to select carefully the cases it will bring so as to use its limited manpower in the most effective way. The decision as to which cases will be litigated, and where and when, cannot be left to the private parties subject to the public accommodations provision of the 1964 Act.

There are other important administrative considerations. Congress has provided in Title X of the 1964 Act for a Community Relations Service, now headed by Governor Leroy Collins, which is intended "to provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race * * *." 78 Stat. 267. It is hoped that this approach—voluntary negotiation and discussion—will avoid the necessity of numerous legal proceedings under Title II. The Department of Justice can coordinate its enforcement activities under Title II with the activities of the Director of the Community Relations Service under Title X, but the efforts of the Community Relations Service could be undermined by untimely suits by those opposed to the

[11] 74 Stat. 86.
[12] 71 Stat. 637.
[13] 18 U.S.C. 241, 242.

provisions of the statute and equally opposed to voluntary compliance with desegregation.

Third, a rule allowing suit to enjoin enforcement of the Civil Rights Act, even though the plaintiff would be in no way harmed by awaiting the outcome of the statutory proceedings, could not be confined to this statute alone. The same principle would be applicable under any other regulatory statute, such as the National Labor Relations Act, the Fair Labor Standards Act, the Securities and Exchange Commission Act, etc. The potentiality for interference with the normal administration of such laws is obvious. Nor do we see how the principle, once established, could be confined to suits raising constitutional issues, unless upon the ground that the action is against the United States where it is not alleged that the Attorney General is acting without constitutional authority.[11] There would seem to be no less ground for asserting equitable jurisdiction in the case of a claim that a regulatory statute did not apply to a complainant against whom it might be enforced, or did not outlaw his conduct, or otherwise bear an interpretation which the government might put upon it.

C. The cases cited by the court below give no support to the assertion of equity jurisdiction to enjoin the enforcement of Title II. Each involved a threat of immediate substantial injury to the plaintiff; none even approached the present case, where the plaintiff cannot be harmed by awaiting any proceedings

[11] See Brief for the Respondent in *Robinowitz* v. *Kennedy, Attorney General*, No. 287, October Term, 1963, pp. 39–40.

against him. Indeed, the cases cited do not even provide authority for the proposition that a person subject to a regulatory statute with immediate penal sanctions can obtain an adjudication as to the constitutionality of the statute without incurring the risk of violation.

The majority of the cases presented situations like that in *Terrace* v. *Thompson*, 263 U.S. 197, where the existence of the statute imposing severe penalties and forfeiture of the land upon one who leased farming land to an alien who had not declared an intention to become a citizen, and also upon the alien who acquired an interest in the land, operated *ex proprio vigore* to interfere with the owner's right to dispose of his property and the alien's right to pursue the occupation of farmer (263 U.S. 215–216):

> The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join them in violating the terms of the enactment and take the risk of forfeiture. Similarly Nakatsuka must continue to be deprived of his right to follow his occupation as farmer until a land owner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease.

The same kind of interference with an advantageous relationship for which there was no adequate

remedy at law was proved in *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365; and *Public Utilities Commission of California* v. *United States*, 355 U.S. 534.[15] The plaintiff's interest in, and need for, an equitable remedy is obvious where the statute imposes criminal penalties on those engaged in business dealings with the plaintiff unless they discontinue their dealings. Then there is no adequate remedy at law, for the plaintiff cannot require those dealing with him to risk criminal penalties to test the validity of the statute.

In *Pennsylvania* v. *West Virginia*, 262 U.S. 553, both States were seeking to withdraw natural gas from the same pool under circumstances in which the withdrawal by one would cause widespread injury in the other. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, was not a suit against the Attorney General to enjoin enforcement but a minority stockholder's bill to enjoin the corporation from complying with the statute; in any event, irreparable harm was threatened. The point was not raised in *Adler* v. *Board of Education*, 342 U.S. 485; undoubtedly because the action had been brought in a State court and presented no question of federal equity jurisdiction. In *Currin* v. *Wallace*,

[15] In *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, the Court did not discuss the irreparable injury, but the theory of equity jurisdiction clearly appears from the Brief for the United States, No. 23, October Term 1957, pp. 23, 27.

306 U.S. 1, the opinion of the lower court clearly shows that the plaintiffs would have incurred penalties "which would be ruinous to them" if they violated the statute and its constitutionality were upheld (95 F. 2d 856, 861). In short, none of the cases relied upon by the court below provide support for the present case, where the plaintiffs have not even shown that they have been harmed in any way by the operation of the statute.

II

SECTION 201 OF THE CIVIL RIGHTS ACT OF 1964, AS APPLIED TO APPELLEE'S RESTAURANT, IS A VALID EXERCISE OF THE COMMERCE POWER

In our brief in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, this Term, we outlined the general plan of Title II of the Civil Rights Act of 1964 which grants all persons a right to the full and equal enjoyment of the goods, services or facilities of any "place of public accommodation" as defined therein, and we endeavored to show that, both in general plan and in specific application to hotels and motels, Title II is a valid exercise of the power to regulate interstate commerce. In this case we deal with the application of Title II to a restaurant which serves the general public and receives the products which it sells from other States.[16]

Section 201 (b) and (c) define as a place of public accommodation subject to the duty to make its goods,

[16] The challenges to Title II based upon the Fifth, Ninth, Tenth and Thirteenth Amendments are answered in our *Heart of Atlanta* brief. Appellees' argument based upon the First Amendment requires no response.

services and facilities available without regard to race or color—

> any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility engaged in selling food for consumption on the premises

if—

> a substantial portion of the food which it serves * * * has moved in commerce.

Appellees allege that their restaurant is covered by the foregoing provision and that they are, nevertheless, engaged in racial discrimination. We accept the allegations. The district court found that in the twelve months preceding the passage of the Civil Rights Act of 1964 appellees purchased approximately $150,000 worth of food locally, but that about 46 percent of its purchases were meat which had been shipped in to the local packer and wholesaler from outside the State of Alabama (R. 36). The government on its part agreed in the lower court that the discrimination at appellees' restaurant was not being supported by the State of Alabama within the meaning of Section 201(d). Thus, the question is whether Title II, as applied to a restaurant receiving about $70,000 worth of food indirectly from outside the State, is a valid exercise of the power of Congress to regulate interstate commerce (Art. I, Sec. 8, cl. 3) and to enact all laws necessary and proper for the execution of the commerce power (Art. I, Sec. 8, cl. 18). The *Civil Rights Cases*, 109 U.S. 3, throw no light upon the issue because the Civil Rights Act of

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1875, 18 Stat. 335, was not conceived or sought to be justified under the commerce power.[17]

The major premise of our argument is the familiar rule that the powers thus delegated to Congress extend to local activities, even though they are not themselves interstate commerce, if they have such a close and substantial relation to interstate commerce that their regulation is appropriate to foster or promote such commerce, or to relieve it from burdens or obstructions. The minor premise of our argument is that Congress, to which the economic question is primarily committed, had ample basis upon which to find that racial discrimination at restaurants which receive from out-of-State a substantial portion of the food served does in fact impose commercial burdens of national magnitude upon interstate commerce.

[17] The opinion below states that the court had been advised that the Solicitor General, in brief, had urged upon the Supreme Court the sufficiency of the grant of power in the commerce clause to sustain the challenged legislation. Evidently the court was partially misinformed. The brief filed by Solicitor General Phillips at the October Term, 1882, makes no such argument, nor is any contained in the summary of his oral argument in the United States Reports, 109 U.S. 3, 5–7. At the October Term, 1879, a brief had been filed in three of the cases by Attorney General Devens. One sentence stated that inns were essential instrumentalities of commerce, which it was the province of the United States to regulate prior to the Civil War amendments. This appears to have been a passing comment for the entire thrust of the brief lies in the proposition that the power to enact the Civil Rights Act of 1875 was granted by Section 5 of the Fourteenth Amendment.

A. THE POWER TO REGULATE INTERSTATE COMMERCE EXTENDS TO LOCAL ACTIVITIES WHOSE REGULATION IS APPROPRIATE TO PROTECT INTERSTATE COMMERCE FROM BURDENS OR OBSTRUCTIONS

1. The power of Congress is not confined to the regulation of the course of interstate commerce but extends to matters substantially affecting it

Article I, Section 8, clause 3 confers upon Congress the power "To regulate Commerce * * * among the several States." Clause 18 of the same Article grants the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *." Under those provisions the Congress has ample power not only to regulate interstate travel, transportation and communication, but also to deal with other matters which substantially affect such commerce even though they might be local when viewed in isolation. "The commerce power," Chief Justice Stone held for a unanimous court in *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119, "is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make the regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." Mr. Justice Jackson, also speaking for a unanimous court, restated the principle in *Wickard* v. *Filburn*, 317 U.S. 111, 125, in words precisely applicable to the present case:

> * * * even if appellee's activity be local and though it may not be regarded as commerce, it

> may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

See, also, *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37; *United States* v. *Darby*, 312 U.S. 100, 119; *Labor Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226–227.

There is no novelty in this principle, nor was it new in the cases cited above. The principle was established by Chief Justice Marshall, speaking for the Court in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, one hundred and forty years ago:

> The genius and character of the whole government seem to be, that its action is to be applied to all those external concerns of the nations and *to those internal concerns which affect the States generally* * * *. [Emphasis added.]

In describing the local activities which Congress could not regulate he was careful to exclude from the definition—and thus mark as within the federal commerce power—those local activities which affect other States and with which it is necessary to deal in order to regulate interstate commerce. Thus, he described the local activities removed from federal action as *ibid.*—

> those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

Although the subsequent course of decision included some departures from the original principle,[18] the principle found frequent application even prior to the Labor Board cases and other decisions cited above. It was applied to violence shutting down production at a coal mine whence coal might be shipped in interstate commerce, *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, to the activities of a local grain exchange shown to have an injurious effect upon interstate commerce, *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, to regulation of the intrastate rates of interstate carriers, *Houston & Texas Ry.* v. *United States*, 234 U.S. 342; *Railroad Comm. of Wisconsin* v. *Chicago B. & Q. R. Co.*, 257 U.S. 563, to the safety devices upon rolling stock moving in local commerce, *Southern Ry. Co.* v. *United States*, 222 U.S. 20, and to the regulation of hours worked by employees engaged in intrastate activity related to the movement of any train, *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U.S. 612. In *United*

[18] The chief departures are *United States* v. *E. C. Knight*, 156 U.S. 1 (rejected in *Standard Oil Co.* v. *United States*, 221 U.S. 1, 68–69, and *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38–39); *Adair* v. *United States*, 208 U.S. 161 (substantially overruled in *Texas and New Orleans Railroad* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548; *Virginian Railway* v. *System Federation No. 40*, 300 U.S. 515); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (disapproved in *United States* v. *Lowden*, 308 U.S. 225, 239); *First Employers' Liability Cases*, 207 U.S. 463 (disapproved in *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 557), *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (disapproved in *United States* v. *Darby*, 312 U.S. 100, and overruled in *Wickard* v. *Filburn*, 317 U.S. 111, 122, n. 21); *Hammer* v. *Dagenhart*, 247 U.S. 251 (overruled in *United States* v. *Darby*, 312 U.S. 100, 117).

States v. *Ferger*, 250 U.S. 199, 203, Mr. Chief Justice White pointed out that the power of Congress "must include the authority to deal with obstructions to interstate commerce (*In re Debs*, 158 U.S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

There was comparatively little federal regulation of interstate commerce in the nineteenth century. The need and therefore the volume of legislation increased greatly in the present century. Furthermore, the increasing interdependence of all parts of the economy and changes in commercial practices have, in fact, linked to interstate commerce through close and substantial connections many activities which, as a matter of fact, had no effect upon such commerce in earlier years. This is the reason the governing principle has found its clearest application in decisions sustaining modern economic legislation. The principle, however, as shown by the Court's opinion in *Gibbons* v. *Ogden*, is as old as the Constitution itself.

2. The power to regulate local matters substantially affecting interstate commerce extends to retail establishments including restaurants

A host of familiar precedents sustains the power of Congress to regulate the activities of retail establishments, including restaurants, which directly or indirectly receive goods from out of State, where those activities burden or obstruct interstate commerce. In *Labor Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, this

Court held that the National Labor Relations Board had jurisdiction over unfair labor practices committed by a retail distributor of fuel oil, all of whose sales were local, where the retailer obtained the oil from a wholesaler who imported it from another State. That decision accords with a long series of cases basing federal power over the labor relations of a retail business on the threat to the market for interstate goods caused by unfair labor practices that may decrease its purchases of goods originating in other States. See, *e.g.*, *Labor Board* v. *Denver Bldg. Council*, 341 U.S. 675, 683–684; *May Department Stores Co.* v. *Labor Board*, 326 U.S. 376 (retail store); *J. L. Brandeis & Sons* v. *Labor Board*, 142 F. 2d 977 (C.A. 8), certiorari denied, 323 U.S. 751 (retail store); *McLeod* v. *Bakery Drivers Local*, 204 F. Supp. 288 (E.D. N.Y.) (bakery); *Retail Fruit & Vegetable Union* v. *Labor Board*, 249 F. 2d 591 (C.A. 9) (retail store); *Int'l. Brotherhood* v. *Labor Board*, 341 U.S. 694 (construction project); *Local 74* v. *Labor Board*, 341 U.S. 707 (store, dwelling renovation); *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20 (retail grocery).

In particular, the Labor Board has on many occasions regulated labor relations in restaurants, on the theory that disputes in restaurants tend to diminish the quantity of food and other products purchased by the restaurant to serve its customers. See, *e.g.*, *Labor Board* v. *Morrison Cafeteria Co. of Little Rock*, 311 F. 2d 534 (C.A. 8); *Labor Board* v. *Local Joint Exec. Board*, 301 F. 2d 149 (C.A. 9); *Labor Board* v. *Childs Co.*, 195 F. 2d 617 (C.A. 2); *Labor Board* v. *Laundry*

Drivers Local, 262 F. 2d 617 (C.A. 9); *Labor Board* v. *Gene Compton's Corp.*, 262 F. 2d 653 (C.A. 9); *Labor Board* v. *Howard Johnson Co.*, 317 F. 2d 1 (C.A. 3), certiorari denied, 375 U.S. 920; *Kennedy* v. *Los Anegeles Joint Exec. Board*, 192 F. Supp. 339 (S.D. Cal.); *Culinary Workers & Bartenders Union* v. *Labor Board*, 310 F. 2d 853 (C.A.D.C.); *Smitley* v. *Labor Board*, 327 F. 2d 351 (C.A. 9); *Stanton Enterprises, Inc.*, 147 NLRB No. 81, 4 CCH Lab. L. Rep. 21,075, para. 13,211; *Stork Restaurant, Inc.* v. *McLeod*, 312 F. 2d 105 (C.A. 2); *McLeod* v. *Chefs, Cooks, Pastry Cooks & Assistants Union*, 280 F. 2d 760 (C.A. 2); *McLeod* v. *Chefs, Cooks, Pastry Cooks & Assistants Local 89*, 286 F. 2d 727 (C.A. 2).[19]

As pointed out in more detail, with appropriate citation of precedents, in our brief in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, pp. 33–36, the same principle has been applied under the Sherman and Federal Trade Commission Acts.

3. Cases holding that interstate commerce ends when goods "come to rest" in a State are irrelevant to the power of Congress to regulate local activities which substantially burden interstate commerce

Implicit in what we have already said is the distinction between the present case and cases holding that interstate commerce ends when goods come to rest in the State of destination. When the issue is whether the goods are immune from State taxation,

[19] See also, *Brennan's French Restaurant*, 129 N.L.R.B. 52; *Joe Hunt's Restaurant*, 138 N.L.R.B. 470; *Childs Co.*, 88 N.L.R.B. 720; *Childs Co.*, 93 N.L.R.B. 281; *Bolton & Hay*, 100 N.L.R.B. 361; *The Stouffer Corp.*, 101 N.L.R.B. 1331; *Mil-Bur, Inc.*, 94 N.L.R.B. 1161.

or whether the States may not regulate the conduct because of the need for uniformity, then it may be pertinent to ask whether the goods have ceased to be part of interstate commerce,[20] for the commerce clause does not operate *ex proprio vigore* to exclude State taxation or State regulation of activities which are not part of, but affect, interstate commerce. The question is not dispositive, however, in judging the reach of the federal power to regulate, for federal power extends, under the principles stated above, to activities which are outside the stream of commerce but substantially affect it. Thus, there are many instances in which a State may tax or regulate goods and activities which are also regulated by federal law. See, *e.g.*, *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177; *Mintz* v. *Baldwin*, 289 U.S. 346.[21]

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[20] The continued vitality of the "come to rest" doctrine is open to question in the field of State taxation, but the change is towards the enlargement of State power. Compare, *e.g.*, *Brown* v. *Maryland*, 12 Wheat. 419, and *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, with *Woodruff* v. *Parham*, 8 Wall. 123, and *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534.

[21] Although a State may tax a retail sale of drugs which were originally imported from other States (*Woodruff* v. *Parham*, 8 Wall. 123), Congress may regulate that sale (*United States* v. *Sullivan*, 332 U.S. 689). While goods stored in a warehouse have come sufficiently to rest to be subject to a State property tax (*Woodruff* v. *Parham*, *supra*), their storage is also subject to federal regulation (*United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86). In each of these cases the goods have in some sense "come to rest" after an interstate sale and transportation, but the power of Congress to regulate subsequent sales or use of the goods continues.

Such cases as *Weigle* v. *Curtice Bros. Co.*, 248 U.S. 285; *Pacific States Box and Basket Co.* v. *White*, 296 U.S. 176, and *Packer Corp.* v. *Utah*, 285 U.S. 105, relied upon by the State of Florida (Brief Amicus Curiae, pp. 30–33), are therefore irrelevant.

United States v. Yellow Cab Co., 332 U.S. 218, presented a similar issue (although it was decided in a statutory and not in a constitutional context). Because the government did not allege or prove that a monopoly of local taxi service would substantially interfere with or burden other interstate commerce, it was necessary to the government's case to show that the monopoly was a restraint of the channels of interstate travel itself, *i.e.*, that the taxis which carried passengers to and from the railroad stations as part of a general local business were themselves instrumentalities of interstate commerce. The Court was therefore called upon to "mark the beginning and end of a particular kind of interstate commerce by its own practical considerations" (332 U.S. at 231), and it concluded that interstate travel began and ended "at the station." The opinion also makes it clear, however, that the Court did not hold that the business of operating taxis was beyond the scope of federal regulation (*id.* at 232–233). The latter question depends, as in other cases, upon whether the activities in fact burden or obstruct, or otherwise affect, interstate commerce. *Superior Court of Washington* v. *Yellow Cab Co.*, 361 U.S. 373, summarily reversed a State injunction on the ground that the National Labor Relations Board has exclusive

jurisdiction over unfair labor practices of a similar taxi service.

B. RACIAL DISCRIMINATION IN RESTAURANTS SELLING FOOD FROM OUT-OF-STATE SOURCES BURDENS AND OBSTRUCTS INTERSTATE COMMERCE

Under the principle developed above, the power of Congress to prohibit racial discrimination in restaurants which receive a substantial portion of the food they serve directly or indirectly from out-of-State sources depends upon whether such discrimination would in fact burden or obstruct the movement of goods in interstate commerce. What affects commerce is a practical inquiry to be answered from the course of business. Cf. *Swift & Co.* v. *United States*, 196 U.S. 375, 398 ("commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business"). The practical inquiry, moreover, is primarily for Congress. As the Court said in *Norman* v. *Baltimore and Ohio R. Co.*, 294 U.S. 240, 311, speaking of whether the gold clauses in private bonds sufficiently interfered with the monetary policy of Congress to justify their invalidation under the power to regulate the currency—

> Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable rela-

> tion to a legitimate end. If it is an appropriate means to such an end, the decision of the Congress as to the degree of the necessity for the adoption of that means, is final. *McCulloch* v. *Maryland*, supra, pp. 421, 423; *Juillard* v. *Greenman*, supra, p. 450; *Stafford* v. *Wallace*, 258 U.S. 495, 521; *Everard's Breweries* v. *Day*, 265 U.S. 545, 559, 562.

The same rule applies to the commerce clause. The Court held in *Stafford* v. *Wallace*, 258 U.S. 495, 521—

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and *it is primarily for Congress to consider and decide the fact of the danger and meet it.* [Emphasis added.]

See, also, *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 32; *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37.

The evidence before Congress gave it ample ground for concluding that racial discrimination in restaurants that receive food from out-of-State sources is so prolific a source of burdens and obstructions to interstate commerce as to make the elimination of discrimination a reasonable means of promoting the interstate flow of goods. The evidence is presented in our brief in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, this Term, but we repeat it here (with some additions and modifications) for the sake of completeness.

In doing so we emphasize that the relationship demonstrated is between the racial discrimination in restaurants and the flow of interstate commerce. We

have no need to argue whether the fact that a restaurant serves food which originated in other States is a sufficient basis for the regulation. While we think that it is sufficient, we assume *arguendo* that the appellees were correct, in their brief in the district court, in arguing that the power of Congress to regulate activities affecting commerce (as distinguished from the actual movement of goods in commerce) depends upon a showing that regulation of the activities could reasonably be found adapted to promoting the flow of goods.[22] For the prohibition of discrimination in

[22] Appellees' argument was that although Congress has power to regulate the interstate movement of goods and persons engaged in interstate travel, transportation or communication for any purpose, it has power to regulate local activities affecting commerce, especially in the State where the goods are received, only if it appears that the regulation of the local activities fosters the interstate commerce. In this way appellees would distinguish such cases as *Mitchell* v. *United States*, 313 U.S. 80; *Henderson* v. *United States* 339 U.S. 816; and also such authorities as the *Lottery Case*, 188 U.S. 321; *Caminetti* v. *United States*, 242 U.S. 470, and *Brooks* v. *United States*, 267 U.S. 432.

Although we are content to argue the present case upon the assumption that the power of Congress is thus limited, appellees' analysis seems erroneous. The Court has never held that Congress has power to regulate all phases of a man's conduct solely because he has previously imported goods in interstate commerce, but it has held that Congress may prohibit one who has imported interstate goods from distributing those goods in a way which is damaging to the locality. In *United States* v. *Sullivan*, 332 U.S. 689, the Court held, without dissent on this point, that Congress has power to forbid a small retail druggist from selling drugs without the form of label required by the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 201, *et seq.*, even though the drugs were imported in properly labeled bottles from which they were not removed until put on the shelves of the local retailer. See also *Federal Trade Commission* v. *Mandel*

covered restaurants falls squarely within that proposition.

1. Racial discrimination in restaurants serving food from out-of-State is a prolific source of disputes burdening and obstructing interstate commerce

Where a restaurant serves food received from interstate commerce, either directly or indirectly, any dispute involving the establishment which causes it to close or reduces its patronage will curtail its purchases and thus diminish the flow of goods in interstate commerce. Current history makes plain the tendency of a practice of racial discrimination to produce such disputes with the consequent interruption in the flow of goods from other States. The situation is the same in principle, therefore, as the countless cases in which the courts have sustained the application of the National Labor Relations Act to establishments receiving goods in interstate commerce on the ground that a labor dispute at such an

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Bros., 359 U.S. 385; *McDermott* v. *Wisconsin*, 228 U.S. 115. The restaurateur practicing racial segregation who purchases food originating in another State for service in a commercial restaurant, is using interstate commerce to perpetuate an evil. While Congress could not regulate his conduct merely because he had imported the goods some time in the past, it can, if it judges discrimination an evil, prohibit him from using the channels of interstate commerce to bring into the State the goods which are the tools of the discrimination. And where Congress can close the channels of commerce to those using out-of-State goods to pursue an injurious practice, it can also forbid using the goods in the practice itself. Compare *United States* v. *Darby*, 312 U.S. 100, 122. See, also, the analysis of Professor Paul A. Freund, S. Rep. 872, 88th Cong., 2d Sess., pp. 82–83.

establishment might result in a strike or other concerted activity that would curtail the interstate movement of goods. See pp. 30–32 above.

The commercial problem has had nationwide scope and almost incredible proportions. The Attorney General testified before the Senate Judiciary Committee that between May 20 and July 31, 1963 (the date of his testimony) there were 639 demonstrations in 174 cities, 32 States, and the District of Columbia. Of these, 302 were concerned solely with discrimination in places of public accommodation.[23] Assistant Attorney General Marshall wrote Senator Javits on April 14, 1964, furnishing later figures (110 Cong. Rec. 7980 (daily ed.)). From May 1963 to April 1964, a total of 2,422 racial demonstrations took place, of which 850 arose from disputes about discrimination in places of public accommodation. The Mayor of Atlanta, Georgia, testified in favor of enactment that "[f]ailure by Congress to take definite action at this time * * * would start the same old round of squabbles and demonstrations that we have had in the past."[24]

The effect upon business conditions and, therefore, on interstate commerce is obvious. The most immediate impact upon restaurants and lunch counters which either refuse to serve Negroes or segregate their facil-

[23] Hearings before the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess., on S. 1731, p. 216.

[24] Report of the Committee on Commerce, United States Senate, on S. 1732, No. 872, 88th Cong., 2d Sess. (February 10, 1964), at 15, 21, quoting Mayor Ivan Allen, Jr. This report is hereafter cited as "*Senate Commerce Report*."

ities has come in the form of sit-in demonstrations. The purpose and effect of a sit-in is, of course, to prevent sales of food as completely as would a strike of the employees of the business. The ultimate result is to eliminate purchases of out-of-State food and supplies. But sit-ins and their effects represent only the beginning of the forms of demonstration and the impact on interstate commerce. Under Secretary of Commerce Roosevelt testified that "[i]t is common knowledge that discrimination in public accommodations and demonstrations protesting such discrimination have had serious consequences for general business conditions in numerous cities in recent years." *Hearings before the Committee on Commerce,* United States Senate, 88th Cong., 1st Sess., on S. 1732, Part 2, Ser. 27, at 699.[25] The examples he describes are impressive.

Retail sales in Birmingham were reported off 30 percent or more during the protest riots in the spring of 1963. Businessmen stated that there were more business failures than during the depression. Downtown stores privately reported that their sales in April of that year were off 40 to 50 percent. They were hit first by a Negro boycott and then by a tense atmosphere that kept customers at home or in suburban shops. The Federal Reserve Bank showed department store sales in Birmingham in the four-week period ending May 18, 1963, down 15 percent over the same period in 1962. During the same period, de-

[25] These hearings are hereafter cited as "*Senate Commerce Hearings*."

partment store sales were up in Atlanta, New Orleans, and Jacksonville. *Ibid.*

Other cities suffered similar experiences. In Atlanta, Mr. Roosevelt testified, "after several months of intermittent demonstrations in 1960–1961, and a boycott sparked by student groups to remove racial barriers in lunch counters and department store restaurants, merchants agreed that the Negro boycott of the downtown area was almost 100 percent effective." Department store sales for a one-week period in February 1961 were down 12 percent from the preceding year, according to the Federal Reserve Bank. *Senate Commerce Hearings,* at 699–700. In Savannah, lunch-counter discrimination in downtown stores finally ended following "a 15-month boycott of the stores by Negroes * * *." This boycott "cut retail sales as much as 50 percent in some places." In the fall of 1962 businessmen in Charlotte, North Carolina, "hit by drives for desegregation of public accommodations, estimated their business was cut by 20 to 40 percent." In Nashville, Tennessee, a boycott was maintained for seven weeks at 98 percent efficiency (*Senate Commerce Hearings,* at 700):

> Negroes in Nashville spend an estimated $7 million annually downtown and their absence had varying results. In one department store, they represented 12 to 15 percent of the business; in another department store, 5 percent. The transit company found its revenues dwindling seriously; the two newspapers found advertising lineage figures falling.

"Variety stores," Mr. Roosevelt continued, "were hit particularly hard. With their lunch counters a

sit-in target, even those who did venture downtown avoided the food counters, which sometimes account for as much as 50 percent of the gross profit. Even businessmen not involved in the sit-ins and which had reputations of good service to Negroes found business dropping." *Ibid.*

It is evident that such a general downturn in retail business must, if left unchecked, result in serious disruption in the flow of goods across State lines. If retail stores cannot sell, they in turn will not buy from wholesalers, who in turn must necessarily reduce their out-of-State purchases. In a highly interdependent economy, as Congressman McCulloch observed, "a local disturbance can affect the commerce of an entire State, region, and the country." [26] Or, as a "top retail executive" said, "[t]his thing has frightening ramifications. It is more serious than people realize. It has now become an economic situation affecting an entire community, the whole city, and the whole country." [27]

Less obvious, but likewise important, is the impact of racial disputes and civil unrest upon the flow of investment. Congress was told of companies which had decided, because of such disputes, not to open plants and offices in Birmingham and Montgomery.[28] Congressman McCulloch, summarizing the evidence, stated: "The segregation of public accommodations

[26] "*Additional Views*" of Congressmen McCulloch, Lindsay, and other Republican committee members, filed in support of the Report of the House Judiciary Committee, 88th Cong., 1st Sess., No. 914, Part 2, on H.R. 7152 (December 2, 1963) at 12. This document is hereafter cited as "*Additional Views*."

and other sources of racial unrest in Birmingham, Ala., have induced many businesses to reconsider their plans to move into or to expand their existing operations in the area." *Additional Views, supra,* at 12.

The story had been the same in Little Rock. As Under Secretary Roosevelt testified (*Senate Commerce Hearings,* at 699):

> In the 2 years before the crisis over schools and desegregation of public accommodations erupted into violence in Little Rock in September 1957, industrial investments totaled $248 million in Arkansas. During the period, Little Rock alone gained 10 new plants, worth $3.4 million, which added 1,072 jobs in the city. In the 2 years after the turbulence which brought Federal troops to the city, not a single company employing more than 15 workers moved into the Little Rock area. Industrial investments in the State as a whole dropped to $190 million from $248 million of the 2 years before desegregation.

The Secretary of Labor drew this conclusion (*Senate Commerce Hearings,* at 623):

> Industry is discouraged from locating or expanding in communities where equal opportunity does not exist and incidents have taken place or are likely to occur. Lack of equal

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[27] Report of the Legislative Reference Service, Library of Congress, to the Chairman of the Senate Commerce Committee, "An Episode Account of Economic Effect of Segregation and Resistance to Segregation in the South," *Senate Commerce Hearings,* at 1384.

[28] *Id.* at 1385.

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facilities for employees and even the latent possibility of demonstrations often removes the locality from consideration as a site for commercial or industrial expansion. This affects industrial development regionally and nationally by limiting the flexibility and free choice of business and hampering labor mobility.

2. Racial discrimination in restaurants serving food from out of State artificially restricts the market for goods moving in interstate commerce

The reduction in the business—and therefore in the purchases of goods from other States—of a restaurant which is involved in a racial dispute is not the only, or even the most direct, effect upon interstate commerce caused by racial discrimination. A second and still more direct link between discrimination and interstate commerce is the reduction in the number of potential customers caused by the discouragement of Negro patronage—which in turn reduces the quantity of goods purchased through interstate channels. As the Attorney General testified (*Senate Commerce Hearings,* at 18–19): "Discrimination by retail stores which deal in goods obtained through interstate commerce puts an artificial restriction on the market and interferes with the natural flow of merchandise." See, also, testimony of Senator Magnuson, 110 Cong. Rec. 7174 (daily ed.).

It is clear that the aggregate effect of racial discrimination by restaurants is substantially to restrict the market for food. Indeed, that is simply a truism. Not only do established businesses sell less but many new businesses are not opened, because of the narrowed market resulting from the exclusionary

practices. This restriction on the market, in turn, retards the flow of goods in interstate channels. To avoid that result Congress may go to the cause.

The testimony of Under Secretary Roosevelt is revealing with respect to the effect of policies of racial exclusion in retail establishments, including restaurants, on the scope of the market for food and other products. His testimony was that Negroes spend less money per capita, *after discounting income differences,* than do whites in restaurants, theaters, and the like, and that the disparity is especially aggravated in the South where such exclusionary practices are widespread. He attributed this to racial discrimination. *Senate Commerce Hearings,* at 695.

The Under Secretary illustrated the point by showing that "Negroes in large northern cities spend more than southern Negroes of the same income class in all of these expenditure categories [*i.e.*, restaurants, theaters, recreational facilities, hotels, motels] * * *, even though white families in northern cities spend less than similar families in southern cities." "In the same income group," he said, "northern Negroes spend more than northern whites for [theaters and recreation], but southern Negroes spend less than southern whites and northern Negroes. Negroes in both the North and South spend less on 'Food eaten away from home' than white people in the same income groups, but the difference is much greater in the South." *Ibid.*[29]

[29] The statistics furnished Congress by the Commerce Department are set out in Appendix B to Brief for the United States in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, p. 70.

The Secretary of Labor gave similar testimony. *Senate Commerce Hearings,* at 623, 624, 626, 630.

The district court, citing *Tot* v. *United States,* 319 U.S. 463, 467–468, seems to suggest that to legislate upon the ground that there is a relationship between racial discrimination in places of public accommodation and interstate commerce is unconstitutional "because of lack of connection between the two in common experience" (R. 49). We submit, with due respect, that the evidence before Congress shows that the court's declaration flies in the face of established fact.

It is obvious, of course, that the volume of goods purchased by any restaurant, viewed in isolation, has scant effect upon the total volume of goods moving in interstate commerce. Here, appellees were receiving annually about $70,000 worth of meat from out-of-State sources. But the size and volume of purchases of the individual establishment are not conclusive. Also "[a]ppropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Labor Board* v. *Reliance Fuel Corp.,* 371 U.S. 224, 226. As the Court held in *Wickard* v. *Filburn,* 317 U.S. 111, 127–128:

> That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

To the same effect, see *Polish National Alliance* v. *Labor Board*, 322 U.S. 643; *Labor Board* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 685, n. 14; *Labor Board* v. *Fainblatt*, 306 U.S. 601.

Congress was also entitled to judge the importance of the commercial relationship between racial discrimination in restaurants and the interstate flow of goods in the light of the data showing that the obstructions were widespread, confined to no single city, State or even region, but part of a nationwide problem. Discriminatory practices in one restaurant in Birmingham are not unrelated to racial discrimination in other restaurants in Birmingham, and also in hotels, motels, theaters and other places of public entertainment. Discrimination in Birmingham and the resulting disturbances are not unrelated to racial discrimination in Chicago, Los Angeles and New York. While Congress was careful to cover only establishments where discrimination would have an individual link to interstate commerce through the receipt of out-of-State goods, it was entitled to judge the importance of that link in the light of its knowledge that the discrimination and resulting threat of disturbances at any one establishment was part of a complex and interrelated pattern. Cf. *Wickard* v. *Filburn*, 317 U.S. 111.

It is also immaterial whether a dispute had occurred or was imminent at appellees' restaurant. In *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 222, the Court held—

> But it cannot be maintained that the exertion of federal power must await the disruption of

> that commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act.

Similarly, in dealing with the threat to commerce arising from a practice of racial discrimination Congress "was entitled to provide reasonable preventive measures"; that was the object of Title II of the Civil Rights Act.

3. The absence of an explicit recital that racial discrimination in restaurants serving food from out-of-State sources burdens interstate commerce does not invalidate Title II

Appellees, if we may judge from their brief in the district court, do not challenge the basic constitutional principles upon which we rely; nor did they offer to prove that there was no evidence upon which one could reasonably conclude that the prohibition of racial discrimination in covered places of public accommodation was adapted to eliminating a cause of obstructions to the free flow of goods in interstate commerce. Indeed, both they and the court below (R. 45–46) seem to agree that the Labor Board cases would be controlling if Congress had made a more explicit finding that discrimination affects commerce comparable to the findings in the National Labor Relations and Fair Labor Standards Acts, and if there were provision for *ad hoc* inquiry into whether the discrimination at a particular restaurant has that effect. From the absence of such provisions appellees and the court below leap to the conclusion that "Congress has sought to put an end to racial discrimination in all restaurants wherever situated regardless of

whether there is any demonstrable causal connection between the activity of the particular restaurant against which enforcement of the act is sought and interstate commerce" (R. 48).

The absence of formal declared findings neither warrants that conclusion nor invalidates the statute. Such recitals are contained in some statutes[30] and omitted from others.[31] Their presence may aid the Court in understanding the factual predicate of particular legislation but they are not essential. The Court has often sustained statutes regulating activities affecting commerce even though there was no express legislative declaration. See, *e.g.*, *Southern Ry. Co.* v. *United States*, 222 U.S. 20; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U.S. 612; *United States* v. *Ferger*, 250 U.S. 199; *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515; *United States* v. *Sullivan*, 332 U.S. 689; *Federal Trade Commission* v. *Mandel Bros.*, 359 U.S. 385, 391.[32]

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[30] See, *e.g.*, Securities Exchange Act of 1934, 15 U.S.C. 78b; Trust Indenture Act of 1939, 15 U.S.C. 77bbb; National Labor Relations Act, 29 U.S.C. 141; Fair Labor Standards Act, 29 U.S.C. 201.

[31] See, *e.g.*, Railway Labor Act, 45 U.S.C. 151; Safety Appliance Acts, 45 U.S.C. 8, 49 U.S.C. 26; Bill of Lading Act, 49 U.S.C. 121; Fur Products Labelling Act, 15 U.S.C. 69; Automobile Information Disclosure Act, 15 U.S.C. 1231; Textile Fiber Products Identification Act, 15 U.S.C. 70.

[32] The passage concerning the necessity of findings quoted by the district court from Mr. Justice Black's concurring opinion in *Polish National Alliance* v. *Labor Board*, 322 U.S. 643, 651–653, is taken out of context. He was addressing himself to the substantive posture in which the case was put by the action of the Labor Board, and speaking of administrative

The fatal error in appellees' argument is that it reverses the normal presumption of constitutionality and asks the Court to assume, because of the absence of formal recitals, (i) that Congress ignored the commercial consequences of racial discrimination that would support the legislation and (ii) that Congress proceeded exclusively upon another ground. To attribute to Congress an improper theory where there are ample constitutional grounds for its action is contrary to settled principles of constitutional adjudication. The Court has repeatedly held, "A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there is no transgression of power by Congress—all the members of which act under an oath of fidelity to the Constitution * * *. It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution," *Legal Tender Cases,* 12 Wall. 457, 531. "Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law * * *. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to

findings. The Court has frequently required explicit findings by an administrative agency before sanctioning its regulation of activities that would be within the scope of State power but for the agency's intervention. *E.g., Florida* v. *United States*, 282 U.S. 194, 211–212; *City of Yonkers* v. *United States*, 320 U.S. 685. These were the principal cases cited by Justice Black.

the Congress." *United States* v. *Butler*, 297 U.S. 1, 67. See, also, *Sinking Fund Cases*, 99 U.S. 700, 718; *United States* v. *Harris*, 106 U.S. 629, 635.[33]

One well-settled corollary is that neither proof nor legislative findings are required where the constitutionality of legislation turns upon whether conditions exist which might lead the legislative body to conclude that the challenged measure was a means reasonably adapted to a permissible objective. The Court dealt with the point explicitly in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152:

> Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not

[33] A similar presumption applies where the constitutionality of a State statute regulating business activities is challenged. See *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U.S. 580, 584, and cases there cited at note 1; *South Carolina Highway Department* v. *Barnwell Brothers*, 303 U.S. 177, 191–192, where it was said: "Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." See, also, *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 594; *McGowan* v. *Maryland*, 366 U.S. 420, 426.

The presumption probably does not apply to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n. 4. Nor are we dealing here with a situation in which "legislation appears on its face to be within a specific prohibition of the Constitution * * *." *Ibid.*

> to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Compare *Townsend* v. *Yeomans*, 301 U.S. 441, 451–452.

In the present case evidence was presented to Congress, showing that racial discrimination in places of public accommodation created a commercial problem of national magnitude. See pp. 38–44, above. Except where it was dealing with discrimination supported by State action in violation of the Constitution (Section 201 (a) and (d)), Congress prohibited discrimination only in those establishments which have a close and intimate tie to interstate commerce—in the case of restaurants, through serving food which comes from out of State. The natural conclusion is that Congress decided that discrimination in the establishments thus linked to commerce so burdened and obstructed that commerce as to require the legislation. We think that Section 201(b) amounts to a declared finding of that fact, but even if it does not, plainly appellees have failed to make the required showing "that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress" (*United States* v. *Butler*, *supra*).

Appellees' argument also fails upon a second, settled point of constitutional adjudication. Where legislation is clearly appropriate to the exercise of a granted power, the courts may not investigate the legislature's

reasoning with a view to attributing to Congress an impermissible objective and thereby invalidating the legislation. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 546; *McCray* v. *United States,* 195 U.S. 27, 54–55; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 160–163; *Arizona* v. *California,* 283 U.S. 423, 454–457.[34] Where an Act of Congress is seen to be reasonably adapted to an objective within the delegated powers of Congress—here the protection of interstate commerce—and it offends no express limitation, the judicial function is exhausted. *McCulloch* v. *Maryland,* 4 Wheat. 316, 420.

4. Title II is not invalidated by the absence of provision for an administrative or judicial finding whether discrimination in an individual restaurant affects interstate commerce, before bringing it within the coverage of the Act

In the district court appellees also argued that Title II could not be sustained as a regulation of local activities affecting interstate commerce because the statute does not provide for an individual *ad hoc* decision, by a court or administrative agency, as to whether racial discrimination in the particular establishment will affect interstate commerce. The argument has no support in the authorities and is inconsistent with the implicit holding of a long line of decisions. It is also unsound in principle.

[34] This is not to say that a statute which is obviously designed to reach a forbidden objective is saved because another merely colorable purpose is cited in justification. Nor is the usual "insulation" from judicial review "carried over when state power is used as an instrument for circumventing a federally protected right," *Gomillion* v. *Lightfoot,* 364 U.S. 339, 347.

Section 201 prohibits racial discrimination in any restaurant where a substantial portion of the food served comes from another State. In enacting the prohibition Congress determined for itself that racial discrimination in such an establishment, when viewed as one of many similar enterprises, does, in fact, create such a danger of obstructing interstate commerce as to warrant protective legislation. With that fact—that part of the link between discrimination and commerce established—there remains only the question whether a particular restaurant receives goods from out of State. The latter issue is subject to judicial determination in every case.

There is no constitutional requirement that the relation between interstate commerce and a particular practice like racial discrimination be left to *ad hoc* litigation in each particular case. In *United States* v. *Darby*, 312 U.S. 100, 120–121, the Court noted the variations in legislative practice and approved a legislative determination of the relation:

> In such legislation [*i.e.* legislation regulating activities intrastate] Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes

> Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. See *United States* v. *Ferger, supra*; *Virginian Ry. Co.* v. *Federation,* 300 U.S. 515, 553.

There was no provision for trial of the question whether the lack of a safety appliance upon a particular piece of rolling stock used in intrastate commerce endangered interstate commerce, *Southern Ry. Co.* v. *United States,* 222 U.S. 20; of whether the hours of labor of back shop employees would interfere with the operation of interstate trains, *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U.S. 612; of whether the issuance of a particular forged bill of lading interfered with commerce, *United States* v. *Ferger,* 250 U.S. 199; or of whether the growing of wheat in excess of the allotment to Filburn's farm would disrupt interstate markets, *Wickard* v. *Filburn,* 317 U.S. 111.

Contrary to the opinion below (R. 46), the course followed in Section 201 of the Civil Rights Act of 1964 closely parallels the scheme of Sections 6, 7, and 15(a)(2) of the Fair Labor Standards Act. The constitutionality of the latter rests upon the ground that the payment of substandard wages to employees engaged in the production of goods for commerce, while

not itself commerce, nevertheless so obstructs and burdens commerce as to be subject to federal regulation. *United States* v. *Darby,* 312 U.S. 100, 117-121. That issue was resolved by Congress. The sole question left for judicial determination was whether the particular goods were produced for commerce. In the present instance Congress itself has said that discrimination in a restaurant which, directly or indirectly, receives goods in commerce, threatens to obstruct or burden that commerce. The only question left for judicial determination is whether the particular restaurant receives goods in commerce. The parallel is complete, and the holding in *United States* v. *Darby* is therefore precisely applicable to the present case.[35]

Indeed, appellees' effort to distinguish the National Labor Relations Act rests upon a misunderstanding of the operation of that statute. Although the Act empowers the Board to prevent unfair labor practices and resolve questions of representation affecting commerce and provision is made for administrative hearing, the Board's inquiry upon this point never goes beyond the relationship between the employer's business and interstate commerce, such as the shipment or receipt of interstate goods. The Board has never made case-by-case inquiries into whether discrimination against union members or other unfair labor prac-

[35] The very argument made by appellees here was presented in *United States* v. *Darby*, and rejected by the Court in the portion of the opinion quoted above. See Brief for Appellee, No. 82, October Term 1940, pp. 76–77.

tices in the particular shop might give rise to a labor dispute which might curtail shipments or orders and so affect interstate commerce. Were an employer to tender proof upon the issue, it would be excluded. Just two terms ago this Court reversed a holding of the Second Circuit setting aside a decision of the Board for lack of "findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce." This Court held that findings as to the quantity of out-of-State oil purchased by Reliance from local wholesalers were alone sufficient. *Labor Board* v. *Reliance Fuel Co.*; 371 U.S. 224; see, also, *Labor Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 326; *Labor Board* v. *Phoenix Mutual Life Insurance Co.*; 167 F. 2d 983, 985 (C.A. 7), certiorari denied, 335 U.S. 845. The adequacy of such findings is also apparent both from the Board's consistent practice and from the lead cases and press releases announcing yardsticks for the exercise of jurisdiction. See *Siemons Mailing Service*, 122 N.L.R.B. 81; *Sioux Valley Empire Electric Assn.*, 122 N.L.R.B. 92. Evidently the Board feels that Congress itself found that unfair labor practices in businesses closely related to commerce have a tendency to obstruct it, leaving open only the existence of a link between the particular business and interstate commerce. If so, the situation under the National Labor Relations Act is indistinguishable from Title II. If the general rule is Board-made, the power of Congress is certainly not less.

CONCLUSION

Although we contend that Congress has, and has exercised, the power to prohibit racial discrimination in places of public accommodation (as defined in Title II), because the discrimination is a prolific source of burdens and obstructions to interstate commerce, we do not suggest that Congress was uninfluenced by the conviction that racial discrimination in public places is a grave moral wrong, lying heavy on the conscience of the entire Nation, which belies the ideals of America. Faced with the need for meeting the commercial problem, Congress was free to choose the remedy adapted to that end which it believed would be most effective, most conducive to the public welfare, and most consistent with the promise of America to all sorts and conditions of men.

Similarly, it is irrelevant whether racial discrimination in restaurants be called a commercial practice or a social custom. If a social custom is carried over into business enterprises, which are subject to legislative regulation, and there becomes a source of burdens or obstructions to interstate commerce, Congress has the same power to prohibit the practice, as a means of protecting commerce, as it would have if the practice were in commerce itself. And the power to prohibit racial discrimination in commerce is too plain for argument. *Mitchell* v. *United States*, 313 U.S. 80, 94; *Henderson* v. *United States*, 339 U.S. 816; *Boynton* v. *Virginia*, 364 U.S. 454.

The power of Congress under the commerce clause and "necessary and proper" clause is broad and

sweeping. It may be argued that such power is subject to abuse. The answer to such arguments, when Congress keeps within its sphere and violates no express constitutional limitation, was voiced by Chief Justice Marshall one hundred and forty years ago in *Gibbons* v. *Ogden,* 9 Wheat. 1, 197:

> The wisdom and the discretion of the congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

Here, then, as on most other aspects of the case, the governing principles go back almost to the founding of the Republic.

The Civil Rights Act of 1964 was debated longer, more widely and more conscientiously than any legislation in recent decades. Title II is plainly appropriate to resolving what was, in a major aspect, a national commercial problem within the reach of Congress under the power to regulate interstate commerce. Title II violates no express limitations such as are contained in the Bill of Rights. No other issue remains.[38]

The judgment below should therefore be reversed, both because the court below had no equity jurisdic-

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[38] The questions raised below by appellees under the First, Fifth and Thirteenth Amendments appear to require no answer beyond our brief in *Heart of Atlanta Motel, Inc.* v. *United States,* No. 515, this Term.

tion and because Title II, as applied to appellees' restaurant, is constitutional.

Respectfully submitted.

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